88-531

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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HERMAN SOLEM, WARDEN
SOUTH DAKOTA STATE PENITENTIARY
and RICHARD D. RIST, ASSOCIATE WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioners,

v.

WILLARD RALPH VOSBURG,

Respondent.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

WHETHER PRISON OFFICIALS ACTED WITH RECKLESS DISREGARD OF RESPONDENT'S RIGHT TO BE FREE OF ATTACKS BY FELLOW INMATES WHERE RESPONDENT FAILED TO REPORT ANY SUCH ATTACKS UNTIL HIS RELEASE FROM THE PENITENTIARY AND THE LEVEL OF VIOLENCE AND SEXUAL ASSAULTS AT THE PENITENTIARY NEITHER PUT PRISONERS IN REASONABLE FEAR FOR THEIR SAFETY NOR APPRISED PRISON OFFICIALS OF THE EXISTENCE OF THE PROBLEM OR THE NEED FOR PROTECTIVE MEASURES?

## PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Herman Solem and Richard D. Rist, have been parties to this litigation from the beginning. They will be referred to as "Petitioners." Respondent, Willard Ralph Vosburg, has also been a party to this litigation from the beginning. He will be referred to as "Respondent" or "Vosburg."

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 845 F.2d 763 (8th Cir. 1988), reh'g denied, (June 16, 1988), and appears in the Appendix (A-2). The judgment of the Court of Appeals dated and filed April 27, 1988, and the judgment denying Petitioners' Petition for Rehearing En Banc dated and filed June 16, 1988, also appears in the Appendix (A-44). The Memorandum Opinion of the United States District Court for the District of South Dakota, Southern Division, was filed on September 11, 1986, and is unreported. A copy appears in the Appendix (A-47), as does a copy of the District Court's judgment. (A-55). A subsequent Memorandum Opinion and Order of the District Court was filed on December 1, 1986, and is also unreported. A copy

appears in the Appendix (A-58), as does a copy of the final judgment (A-65).

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HERMAN SOLEM, WARDEN
SOUTH DAKOTA STATE PENITENTIARY
and RICHARD D. RIST, ASSOCIATE WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioners,

v.

WILLARD RALPH VOSBURG,

Respondent.

## JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was dated and entered April 27, 1988.

A timely petition for rehearing en banc was filed on May 19, 1988, and was denied on June 16, 1988 (Appendix A-46). This petition

was filed within ninety days of that date pursuant to Supreme Court Rule 20.4.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

2. United States Constitution amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

1. Procedural History.

This case involved two claims for damages and a request for injunctive relief. Respondent, an inmate at the South Dakota State Penitentiary, alleged that he had been raped by other inmates at the penitentiary on four separate occasions. Respondent brought one claim under 42 U.S.C. § 1983 and alleged

that his right to be free from cruel and unusual punishment pursuant to the eighth amendment to the United States Constitution had been violated. Respondent's second claim alleged negligence on the same facts. The Defendants were Herman Solem, Warden of the South Dakota State Penitentiary; Richard D. Rist, Associate Warden for Custody; Clifford E. Hoff, Associate Warden for Classification; Richard Mohr, Respondent's counselor at the penitentiary; Lloyd Stivers, principal of the penitentiary high school and a rotating member of the classification board at the time of Respondent's initial classification; and Jervin Wait, supervisor of the print shop and shoe shop where three of the alleged rapes occurred; and John Doe.

The case was tried to a jury commencing January 7, 1986. At the close of Respondent's presentation of evidence, the court directed a verdict in favor of

Defendant Stivers. At the close of all the evidence, the court directed verdicts in favor of Defendants Hoff, Mohr, and John Doe.

The jury returned a verdict on January 14, 1986, awarding Respondent $10,000 on his civil rights claim against Petitioners Solem and Rist. The jury found in favor of the Petitioners on the negligence claim and found no liability as against Defendant Wait.

On September 11, 1986, after a hearing on injunctive relief, judgment was entered in favor of Respondent and against Petitioners Solem and Rist, and damages were assessed under Count I of the Complaint. It was further ordered that the Complaint against Defendants Hoff, Stivers, Mohr, and Wait be dismissed on the merits with prejudice and without costs. It was further ordered that Respondent's request for injunctive relief be granted in part and ordered that penitentiary officials refer for prosecution all cases in

which they have reasonable cause to believe that a rape has occurred at the prison. The court denied Respondent's request that double celling be prohibited in the intake/orientation and protective custody areas of the penitentiary, that a guard be required to be stationed at the shop area, that the pass system be modified to prevent inmates from being able to use the system to call other inmates to any areas of the penitentiary, and that all victims of sexual assaults receive counseling.

On September 23, 1986, Petitioners filed a Motion for Judgment Notwithstanding the Verdict and New Trial, Alternatively. On November 26, 1986, Respondent filed an Application for Award of Attorney Fees and moved to amend the judgment to include post-verdict interest.

On December 1, 1986, the district court filed the final judgment in this case denying

Petitioners' Motion for Judgment Notwithstanding the Verdict and New Trial, Alternatively; granting Respondent's motion to recover attorney fees and costs; and denying Respondent's motion to amend judgment to include post-verdict interest.

Petitioners Solem and Rist timely filed a Notice of Appeal on December 30, 1986. Respondent subsequently filed a notice of cross-appeal which was later amended.

The panel decision of the Court of Appeals for the Eighth Circuit was filed on April 27, 1988, and may be found at 845 F.2d 763 (8th Cir. 1988) (Appendix A-2). The panel affirmed the judgment on the verdict, awarded attorney fees and post-verdict interest, and remanded the case to the district court with directions to dismiss the prayer for injunctive relief as moot. A Petition for Rehearing En Banc was timely

filed and subsequently denied on June 16, 1988.

2. Statement of Facts.

Respondent was incarcerated at the South Dakota State Penitentiary on December 16, 1982. On February 10, 1984, three days prior to his release, Respondent presented penitentiary officials with this lawsuit alleging that he had been raped four times by fellow inmates. The presentation of the lawsuit was the first notice of his allegations to any member of the prison staff, including Petitioners. As will be shown in this petition, Respondent was required by law and failed to prove at trial, inter alia, that violence and sexual assaults occur with sufficient frequency that prisoners are put in reasonable fear for their safety.

From January 1980, until March 1985, there were sixty-one reported fights and

thirty-one reported assaults at the penitentiary. Of the thirty-one reported assaults in the sixty-three month time frame, ten were classified as serious assaults and four were classified as sexual assaults. All fourteen assaults were reported to the South Dakota Division of Criminal Investigation.

From January 1, 1981, through June 30, 1983, a period of time more relevant to Vosburg's incarceration, there were approximately thirty-five fights and sixteen assaults reported at the state penitentiary. Four were serious assaults, and one was a sexual assault.

Medical services are provided the inmates inside the walls of the penitentiary. No incidences of sexual assault had been reported through that department from 1981 to the time of trial.

In the eight years prior to trial of providing counseling services at the

penitentiary, reports of sexual assaults were very unusual. An effort was made to review their policy on sexual assaults on a regular basis because it was used so infrequently.

Vosburg witnessed no widespread acts of violence at the state penitentiary. Vosburg testified that he had been struck in the face twice. However, Vosburg admitted that he also was a perpetrator of two assaults. Vosburg's other experiences with prison violence in his fourteen months of incarceration can be summarized as follows: 1) He was bumped by another inmate who told him to watch where he was going or suffer the consequences; 2) he witnessed two protective custody inmates in a fight which was immediately stopped by guards who took at least one of the offenders to the adjustment center; 3) he witnessed an inmate who appeared to be lying unconscious in protective custody; and 4) he was told of an

assault on an inmate in a shower room at West Hall.

In addition to his own testimony, Vosburg called two other inmates to testify regarding the prevalence of sexual assaults at the state penitentiary. None of the testimony was corroborated. Stephen Headrick claimed to have been raped three times by the same person over a three-week period in 1981. Headrick also claimed to have been forced to perform oral sex on four inmates during another incident. Other than his personal experience, Headrick gave no testimony regarding other assaults at the penitentiary.

Inmate Ken Thomas testified that he had been raped each night for the first eight nights that he was at the penitentiary in 1981. Thomas also testified that he witnessed "numerous" assaults that were, according to him, not reported. Other than that ambiguous assertion, Thomas never

specified any particular assaults that he witnessed.

A third inmate, George Shepard, gave no evidence of assaults at the penitentiary other than to corroborate Vosburg's testimony regarding some of his personal confrontations.

The inmates' testimony established nothing more than isolated incidences of assaults and sexual assaults at the state penitentiary. No evidence even suggested that all prisoners, or an identifiable group of prisoners, were put in reasonable fear for their safety.

## REASONS FOR GRANTING THE WRIT

### THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OF OTHER UNITED STATES COURTS OF APPEALS.

A. Introduction.

This case draws into question the level of violence sufficient to support a finding that prison officials are deliberately indifferent to the safety of prisoners. The Eighth Circuit opinion below overstepped clear guidelines in decisions of this Court and other circuit courts. Therefore, this petition should be granted.

B. The Eighth Circuit Decision in this Case.

In the case at bar, the Eighth Circuit devoted a single paragraph to the level of violence at the South Dakota State Penitentiary:

> The evidence contains specific and detailed accounts of the four separate instances in which Vosburg was sexually assaulted. Other young inmates also gave evidence that they had been raped repeatedly at the penitentiary, both in the intake area and other locations throughout the facility. Both sides presented statistical evidence as to the level of violence and sexual assault in the

> penitentiary. Vosburg also presented evidence that revealed that prison officials failed to refer assaults to the local prosecutors. The prison official in charge of investigating crimes at the South Dakota State Penitentiary testified that of approximately 500 crimes investigated by him between 1984 and 1985, only two or three were referred to prosecution. Conversely, the defendant's own expert witness, Warden Winston Satran of the North Dakota State Penitentiary, testified that all crimes committed in the North Dakota institution are referred to the local prosecutor. Furthermore, disciplinary reports revealed that there were over 140 instances of fighting and assaults from 1981 to 1985 in the South Dakota institution. None were referred to the local prosecutor. No sexual assaults at the South Dakota Penitentiary, including an instance in which an inmate had a broomstick shoved into his rectum, have ever been prosecuted. No inmate who has ever been accused of committing a rape in the South Dakota State Penitentiary, including Vosburg's assailants, has ever been disciplined.

Vosburg v. Solem, 845 F.2d 763, 766 (8th Cir. 1988).

Petitioners respectfully submit that this portrayal of violence is based, in large part, on irrelevant or nonexistent facts. Failure to refer crimes for prosecution has no direct relevance to the level of violence existing at an institution. In addition, references to "500 crimes," "140 instances of fighting and assaults" and the evidence of "other young inmates" do not accurately portray the actual occurrences of violence at the institution nor do they have support in the record.

The phrase "500 crimes" was given by a prison official during a deposition. It is a reference to disciplinary write-ups which would mostly include such offenses as loitering and insolence. Only two or three were referred for prosecution because they were the only violent crimes.

The reference to "140 instances of fighting and assaults" is based solely in

argument, not in fact. Winston Satran, the expert referenced in the Eighth Circuit opinion, stated that no pervasive risk of harm existed at the penitentiary during the time in question. He found a high degree of safety for inmates based on open staff/inmate communication, the system of rules and regulations, advice given to inmates by staff, and the sensitivity by the staff to inmate needs and conditions.

The evidence by "other young inmates" was only the uncorroborated testimony of Headrick and Thomas mentioned above.

C. Deliberate Indifference.

1. Decisions by this Court.

In an evolution of cases, this Court has given dynamic life to the eighth amendment. In Estelle v. Gamble, 429 U.S. 97 (1976), this Court offered a history of the recent decisions:

> Our more recent cases, however, have held that the Amendment proscribes more than physically barbarous punishments. See, e.g., Gregg v. Georgia, supra, at 171, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion); Trop v. Dulles, 356 U.S. 86, 100-101, 2 L.Ed.2d 630, 78 S.Ct. 590 (1958); Weems v. United States, 217 U.S. 349, 373, 54 L.Ed. 793, 30 S.Ct. 544 (1910). The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .," Jackson v. Bishop, 404 F.2d 571, 579 (CA8 1968), against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, supra, at 101, 2 L.Ed.2d 630, 78 S.Ct. 590; see also Gregg v. Georgia, supra, at 172-173, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion); Weems v. United States, supra, at 378, 54 L.Ed. 793, 30 S.Ct. 544, or which "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, supra, at 173, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion); see also Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 91 L.Ed. 422, 67 S.Ct. 374 (1947); Wilkerson v. Utah, supra, at 136, 25 L.Ed. 345.

Estelle, supra, at 102-103.

Based upon these principles, this Court and the Circuit Courts of Appeals have attempted to fashion the appropriate standard of care in civil rights actions against prison officials.

In Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668 (1986), an inmate sued prison officials seeking damages under 42 U.S.C. § 1983 for injuries he suffered when they negligently failed to protect him from another inmate.

The inmate claimed that prison officials had violated his constitutional rights under the eighth and fourteenth amendments. The district court found, inter alia, that the prison officials negligently failed to take reasonable steps to protect the inmate and that he was injured as a result. On appeal, this Court held that the protections of the due process clause, whether procedural or substantive, are not triggered by lack of due

care by prison officials. Davidson, 106 S.Ct. at 670-1.

In Whitley v. Albers, 475 U.S. 312, 89 L.Ed.2d 251 (1986), a prison inmate who had sought to assure the safety of elderly prisoners during a prison riot was shot in the leg by a prison guard. The inmate brought suit under 42 U.S.C. § 1983 claiming that he had been deprived of his rights under the eighth and fourteenth amendments. This Court declared, "To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." Whitley, 89 L.Ed.2d at 260. Additionally, this Court stated:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of

> confinement, supplying medical needs, or restoring official control over a tumultuous cell block.

Whitley, 89 L.Ed.2d at 260-261.

2. Decisions of the Circuit Courts of Appeals.

a. The Martin decision.

The legal basis for this lawsuit was, in large part, a 1984 decision of the Court of Appeals for the Eighth Circuit. In Martin v. White, 742 F.2d 469 (8th Cir. 1984), the court set forth parameters of liability in a civil rights lawsuit brought by prison inmates who sought injunctive and monetary relief upon their allegation that failure of prison officials to take reasonable steps to protect them from attacks by other inmates violated their eighth amendment right to be free from cruel and unusual punishment.

The Martin case requires that prison officials be liable only when they are deliberately indifferent to a prisoner's

constitutional rights either because they actually intended to deprive him of some right or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates. Martin, supra, at 474.

Reckless disregard of Respondent's right to be free from attacks by other inmates is shown by 1) the existence of a pervasive risk of harm to inmates from other prisoners and 2) a failure by prison officials to reasonably respond to that risk. Id. A pervasive risk of harm may not ordinarily be shown by pointing to a single incident or isolated incidences, but may be established by much less than proof of a reign of violence and terror in the particular institution. However, violence and sexual assaults must occur with sufficient frequency that prisoners are put in reasonable fear for their safety and to reasonably apprise prison

officials of the existence of the problem and the need for protective measures. It is not necessary to show that all prisoners suffer a pervasive risk of harm. It is enough that an identifiable group of prisoners do, if the complainant is a member of that group. Id.

b. The Martin facts.

The facts in Martin are egregious. The prison officials stipulated that plaintiffs could produce a number of inmates who would testify that assaults, including those of a sexual nature, occur on a "fairly regular basis." Martin, supra, at 472.

The circuit court noted that based upon a dissenting opinion in a prior case, the conditions at the Missouri prison had existed for some time. Martin, supra, at 475 n.6. Homosexual acts and sexual assaults were matters of common knowledge among the inmates and the cell door locks could easily be picked with any sharp object. Id. The court

concluded, "Clearly, officials of the Missouri Training Center have had the deficiencies of the institution pointed out to them, and cannot reasonably protest that they were not aware of the existence of the problem." Id.

c. The decisions of other circuit courts.

The decisions of other circuit courts require deliberate indifference to be shown by obduracy and wantonness.

In Riley v. Jeffes, 777 F.2d 143 (3d Cir. 1985), the Court of Appeals for the Third Circuit found that an inmate stated a claim for relief under the standard of deliberate indifference when he alleged that procedures at the prison allowed other inmates "easy access to plaintiff's cell while he is sleeping" and as a result, "for the past six months plaintiff had to live under extremely dangerous conditions of

life-threatening nature, robberies, assaults, thefts, homosexual activities, fights, stabbings." Riley, supra, at 146. The court opined "We do not see that any distinction may profitably be drawn between deliberate indifference and wanton indifference." Riley, supra, at 147 n.8.

The Circuit Court of Appeals for the Fourth Circuit in Shrader v. White, 761 F.2d 975 (4th Cir. 1985) considered a class action under 42 U.S.C. § 1983 which alleged that various conditions of confinement, including the level of violence, violated the eighth amendment proscription against cruel and unusual punishment. The court reviewed their prior decisions of Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973) and Withers v. Levine, 615 F.2d 158 (4th Cir. 1980), cert. denied, 449 U.S. 849 (1980) in light of Rhodes v. Chapman, 452 U.S. 337 (1981) and declared that fear of attack must be

inflicted recklessly or wantonly, totally without penological justification and result in significant mental pain. Shrader, supra, at 979.

In Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986), the Court of Appeals for the Fifth Circuit found violence to be of such proportions that it constituted a violation of the eighth amendment. Among the numerous examples was this finding:

> A medical assistant working at the central jail testified that fights broke out "all the time." An expert witness called by the defendants testified that, based on his experience with similar jails, "sexual abuse and threats of sexual abuse are high in this institution." One of the plaintiffs' experts estimated that over 1200 acts of violence were reported by inmates every year. Another of plaintiffs' experts testified that the actual number of sexual assaults may be five to six times greater than the reported number of such incidents.

Alberti, supra, at 1225-6.

The Court of Appeals for the Seventh Circuit in Benson v. Cady, 761 F.2d 335 (7th Cir. 1985) considered the term "reckless disregard" as it applies to eighth amendment claims:

> A defendant acts recklessly when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position. Recklessness is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation where a high degree of danger is apparent. (Citation omitted.) The standard is an objective one. (Citation omitted.) Although subjective unawareness of the risk is no defense, the risk must be foreseeable. Indeed, risk is defined as a recognizable danger of injury. (Citation omitted.) The risk must also be substantial.

Benson, supra, at 339.

Accordingly, in the context of an alleged failure by correctional officials to protect a prisoner from the risk of attack, the court held the plaintiff must prove that officials knew or had reason to know there

was a "strong likelihood" that violence would occur. Benson, supra, at 339-340. The court reasoned that where assaults occur so frequently as to be "pervasive," a substantial risk of violence is apparent. Conversely, random acts of violence provide no basis for a finding of substantial, foreseeable risk of harm. Benson, supra, at 340.

In Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), the Circuit Court of Appeals for the Tenth Circuit found that the state had failed to reasonably protect inmates from constant threats of violence and assaults from other inmates. The level of violence necessary to support the finding is apparent:

> Here the evidence shows that in recent years the inmate population at Old Max has been plagued with violence and the fear of violence.
>
> The violence and fear which permeated the prison population of Old Max in past years continues to exist. The efforts of many inmates

> are directed at merely staying alive while they serve their sentences. (Citation omitted.) Protective custody inmates are routinely threatened and attacked by other inmates.

Ramos, supra, at 572-573 (emphasis added).

In Zatler v. Wainwright, 802 F.2d 397 (11th Cir. 1986), the Eleventh Circuit Court of Appeals refused to find liability on the part of a prison official charged with supervisory duties based upon his attitude as shown by his responses to interrogatories.

> Based upon these responses, it is clear that Wainwright's attitude is not at all one of reckless disregard of Zatler's right to be free from violent attacks or deliberate indifference to his constitutional rights.

Zatler, supra, at 402.

The similarity between Wainwright's responses and those of Petitioners' herein is striking.

D. Violence and Sexual Assaults Occur Infrequently at the South Dakota State Penitentiary and, Therefore, Deliberate Indifference does not Exist.

The crux of this case is the level of violence at the South Dakota State Penitentiary. It is a low-tension prison; one where prisoners "pull easy time." It simply does not have the violence which is necessary to form the basis of liability.

In Vosburg, the Eighth Circuit Court of Appeals has violated its own standard as well as that which has been clearly established in other circuits and this Court.

CONCLUSION

In the case at bar, Respondent failed to show the necessary level of violence. It is insufficient to merely prove to the satisfaction of the jury that he may have been raped or otherwise harmed. He must additionally prove that a risk of harm exists to all prisoners or to an identifiable group

and that prison officials were reasonably apprised of the risk. Respondent's evidence was totally lacking in that regard. If the Eighth Circuit decision is allowed to stand, a finding of deliberate indifference could be made against any prison in the United States.

Based upon the foregoing arguments and authorities, Petitioners respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Dated this 8th day of September, 1988.

Respectfully submitted,

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# APPENDIX

## APPENDICES

A. Opinion of the United States Court of Appeals for the Eighth Circuit . . . A-2

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APPENDIX A

WILLARD RALPH VOSBURG,
Appellee,

v.

HERMAN SOLEM and RICHARD RIST,
Appellants.

United States Court of Appeals
for the Eighth Circuit
Nos. 87-5032 and 87-5033

Submitted August 31, 1987

Filed April 27, 1988

Appeals from the United States District Court
for the District of South Dakota

Before LAY, Chief Judge, MAGILL, Circuit Judge, and LARSON, Senior District Judge.*

LAY, Chief Judge.

Willard Vosburg brought this 42 U.S.C. § 1983 (1982) action, seeking monetary and injunctive relief. Vosburg claims that Herman Solem, Warden of the South Dakota

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*The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

State Penitentiary, and Richard D. Rist, Associate Warden, violated his right to be free from cruel and unusual punishment. Following a five-day trial, the jury returned a verdict awarding Vosburg $10,000 on his section 1983 claim. We affirm the judgment on the verdict, award attorney's fees and post-verdict interest, and we remand the case to the district court with directions to dismiss the prayer for injunctive relief as moot.

**Background**

Vosburg entered the South Dakota State Penitentiary on December 16, 1982, to begin serving his sentence for possession of a stolen motor vehicle. It was his first time in prison. At the time, Vosburg was nineteen years old. He weighed approximately 135 pounds.

Two days after Vosburg entered the penitentiary, Edward Abbenhaus was brought to

the penitentiary to serve out his sentence. Abbenhaus had killed his mother by strangling her. Vosburg and Abbenhaus met in the "intake area" of the penitentiary. Abbenhaus soon asked Vosburg to share a cell ("double cell") with him. At that time, the penitentiary did not have a policy of segregating inmates in the intake area based upon the nature of their crime, criminal record, or psychological profile. With the prison officials' approval, Vosburg was placed in a cell with Abbenhaus.

Four days after Vosburg and Abbenhaus began double celling, Abbenhaus assaulted Vosburg. Abbenhaus shoved a piece of cloth into Vosburg's mouth and raped him. Word of Vosburg's rape spread throughout the prison. Vosburg was sexually assaulted again on three separate occasions by three other inmates.

After his release in February of 1984, Vosburg brought this section 1983 action.

Following the return of the jury's verdict, the district court[1] took Vosburg's requests for injunctive relief under advisement. After several months' consideration, the district court granted Vosburg partial injunctive relief, requiring defendants to report to county and state law enforcement officials all cases in which the prison authorities had reasonable cause to believe that a rape had occurred in the penitentiary. The district court, however, denied Vosburg's request for an injunction prohibiting double celling inmates in the intake and protective custody areas of the penitentiary. The district court also denied defendants' motions for judgment notwithstanding the verdict and a new trial, and awarded Vosburg

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[1]The Honorable John B. Jones, United States District Judge for the District of South Dakota.

attorney's fees and costs under 42 U.S.C. § 1988.

**Liability**

The prison officials urge this court to reverse the district court's denial of their motion for a judgment n.o.v. on the ground that Vosburg failed to prove that they acted with reckless disregard of his right to protection from attacks of other inmates.[2] The district court submitted the issue of liability to the jury under the following instruction:

> Prison officials may be liable for a violation of a prisoner's civil rights where they are deliberately indifferent to a prisoner's constitutional right to be free from sexual attacks by other inmates, if they actually intend to deprive him of that right, or if

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[2]The defendants also appeal the award of attorney's fees as excessive. Vosburg cross appealed the district court's refusal to enjoin double celling in the penitentiary.

> they act with reckless disregard of this right.
>
> Reckless disregard of a prisoner's right to be free from sexual attacks by other inmates may be shown by the existence of a pervasive risk of harm to inmates from other prisoners and a failure by prison officials to reasonably respond to that risk.
>
> A pervasive risk of harm may not ordinarily be shown by pointing to a single incident or to isolated incidents, but it may be established by much less than proof of a reign of violence and terror in the particular institution. It is enough that violence and sexual assaults occur with sufficient frequency that prisoners are put in reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures.
>
> It is not necessary to show that all prisoners suffer a pervasive risk of harm. It is enough that an identifiable group of prisoners do, if the complainant is a member of that group.

There is no challenge to this instruction. It clearly reflects the applicable law. See Martin v. White, 742 F.2d 469, 474 (8th Cir.

1984); Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981), aff'd, 461 U.S. 30 (1983). Solem and Risk [sic] argue that Vosburg failed to prove that the risk of violence and sexual assault was substantial enough to put them on notice of the danger Vosburg faced. The defendants also maintain that prison policies, such as orientation for new inmates, availability of protective custody, and training of prison personnel, were adequate to address the existing level of violence at the penitentiary. We are satisfied, however, that sufficient evidence supports the jury's finding of liability.

The evidence contains specific and detailed accounts of the four separate instances in which Vosburg was sexually assaulted. Other young inmates also gave evidence that they had been raped repeatedly at the penitentiary, both in the intake area and other locations throughout the facility.

Both sides presented statistical evidence as to the level of violence and sexual assault in the penitentiary. Vosburg also presented evidence that revealed that prison officials failed to refer assaults to the local prosecutors. The prison official in charge of investigating crimes at the South Dakota State Penitentiary testified that of approximately 500 crimes investigated by him between 1984 and 1985, only two or three were referred to prosecution. Conversely, the defendant's own expert witness, Warden Winston Satran of the North Dakota State Penitentiary, testified that all crimes committed in the North Dakota institution are referred to the local prosecutor. Furthermore, disciplinary reports revealed that there were over 140 instances of fighting and assaults from 1981 to 1985 in the South Dakota institution. None were referred to the local prosecutor. No sexual

assaults at the South Dakota Penitentiary, including an instance in which an inmate had a broomstick shoved into his rectum, have ever been prosecuted. No inmate who has ever been accused of committing a rape in the South Dakota State Penitentiary, including Vosburg's assailants, has ever been disciplined.

Vosburg also presented extensive testimony as to the prison authorities' failure to respond to the risk of sexual assault; testimony that revealed that the prison authorities did not screen violent offenders from the less violent and non-violent when making cell assignments. Inmates were not segregated based upon the nature of the crime for which they were convicted, and no policy existed to segregate inmates who were the likely targets of sexual assaults. Warden Satran testified that at the North Dakota State Penitentiary

newly-admitted inmates are screened and those convicted of violent crimes are segregated from the other inmates until prison authorities have an opportunity to assess their behavior. Warden Satran stated that if he had known what Warden Solem knew concerning the crimes with which Vosburg and Abbenhaus had been convicted, those two inmates would not have been double celled in his institution.

Both sides presented expert opinion testimony about the adequacy of the prison policies in place to protect the inmates from violence and sexual assault. Evidence adduced at trial revealed that prison authorities permitted the use of a pass system that allowed prisoners to have young inmates, like Vosburg, brought to an isolated area within the prison where no guards were stationed. Vosburg also presented evidence which illustrated that guards were stationed

in a location removed from the inmates, where they could not see into the individual inmates' cells. Evidence revealed that one guard attempted to monitor 175 cells on four separate tiers during the night. Many of these cells housed two prisoners and monitoring rounds were conducted only every three or four hours.

The frequency of assaults at the penitentiary was sufficiently high that a jury might reasonably find pervasive risk of harm to the prisoners. The prison officials' failure to develop administrative policies to protect Vosburg and others in the intake facility and other high-risk areas of the penitentiary clearly supports a jury finding that the defendants failed to reasonably respond to the risk of inmate assault. Accordingly, we affirm the district court's denial of the defendants' motion for a judgment n.o.v. and a new trial.

**Instructions**

The prison officials urge in the alternative that the district court erred in denying their motion for a new trial on the ground that there was an erroneous jury instruction on damages. Although the defendants did not object to the instructions as required under Fed. R. Civ. P. 51, they maintain that we should consider the damage instructions as plain error and hold that the failure to object should not bar them from raising the issue on appeal. Defendants argue that the instruction challenged has not been held to be erroneous by the Supreme Court of the United States and that such holding occurred after the trial in the present case. Assuming, without deciding, that this would present an exception under

Rule 51 to recognize plain error,[3] we find that the error committed was harmless and not prejudicial under the circumstances of this case.

In Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986), the Supreme Court held that a jury instruction authorizing an award of compensatory damages based upon the fact-finding assessment of the value or importance of a substantive constitutional right constituted an erroneous charge. We find little variance between the instruction given here and the charge rendered in Stachura. We therefore hold that

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[3] See Ratliff v. Wellington Exempted Village School Bd. of Educ., 820 F.2d 792, 798 (6th Cir. 1987); but see Carter v. District of Columbia, 795 F.2d 116, 135 n.12 (D.C. Cir. 1986) (plaintiffs' constitutional damage award impenetrable under Rule 51 because defendant failed to object to the instruction at the time it was given).

the instruction given by the trial court was in fact erroneous.[4] See id. at 312-13.

We note in the present case the trial court instructed the jury that if there was a constitutional violation then the jury should award damages based upon: "(1) The physical harm suffered, including physical pain and discomfort; (2) The emotional and mental harm suffered, including fear, humiliation and mental anguish; (3) The extent and duration of his injuries;" as well as "discretionary" damages for violation of Vosburg's constitutional right to be free from cruel and unusual punishment. In Stachura, the Court found that the damages awarded were "probably significant" as they related to the

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[4]No discussion is necessary to recognize that an intervening decision between the time of trial and appeal provides controlling law on appeal. See Flanigan v. Burlington N. Inc., 632 F.2d 880 (8th Cir. 1980).

value given for the violation of the constitutional right. The Stachura Court indicated that the award was not derived from any monetary loss and that a major point of the damages was to "compensate" plaintiff for the abstract value of his due process and first amendment right. Id.

We are confronted with a much different record. In the present case the record demonstrates that plaintiff was sexually assaulted on four different occasions. On each of these occasions the record illustrates both the substantial emotional and physical harm the plaintiff suffered. Vosburg was a youth of nineteen years. At trial, an expert testified that rape is the most devastating nonlethal offense that a person can endure. Young Vosburg most certainly will live with, and may suffer from these acts of human degradation for the rest of his life. The details of some of these

assaults provide the specifics of Vosburg's vicious and sickening experience.[5]

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[5]Vosburg was asked by his counsel:

Q What happened in June of '83 when you were there with Mr. Miller and Mr. Brooks?

A They took me to the broom closet and --

Q In the broom closet or dark room?

A The dark room, excuse me. And they -- we waited there until the people in the dark room left, which would be approximately a minute.

Q Did you see any guards up there at that time?

A No, I did not.

Q Did you see Mr. Wait around after you gave him your pass?

A No, I did not.

Q Then what happened?

A After everybody else besides me, Mr. Miller and Mr. Brooks, everybody else left, then Mr. Miller said that he was going to go out and stand jiggers. Mr. Brooks told me to get -- take off my pants and then get into a dog position.

(Footnote Continued)

Our research also reveals that in sexual

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(Footnote Continued)

Q Then what happened?

A He put lotion on my rectum, shoved his penis in and started slapping me.

Q How long did that last?

A Approximately forty-five minutes.

Q Was that painful?

A Yes, it was.

Q Did you have any bleeding from that?

A Yes, I did.

Q Where?

A From the rectum.

Q Did you report that to anybody?

A No, I did not.

Q Why didn't you report that to the doctor?

A Because he would have asked how I came about this. I would have had to tell him and I would have been classified a snitch. That, and it was an embarrassing situation.

(Footnote Continued)

assault cases, damage awards throughout the

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(Footnote Continued)
Q Then what happened after that?

A I had started to put on my pants when Mr. Miller comes into the dark room.

Q And what happened then?

A He told me that I was either going to give him a blow job or have sex with him. I was in so much pain at the time that I didn't want no more, so I went ahead and gave him a blow job.

Transcript at 135-37.

A He told me that he wanted to show me something. So he leads me out into the hall, he walks down the hall a little ways with me and he opens this room with a six-inch piece of metal bar and he told -- he tells me, "It's in there." I don't see anything in there and I ask him, "What?" And he says, "You don't have any money, right?" And I goes, "Yeah. I haven't got a job yet." And he goes, "Well, I don't want no money, I want sex." I told him, "I'm not that way." While I hesitated, he pushed me in.

Q Then what happened?

A He closed the door and he took out the -- his penis and he told me to take off my pants. So I did. Then he put hand cream on

(Footnote Continued)

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(Footnote Continued)
my rectum and he put his penis up my rectum.

Q How long did that last?

A About ten to fifteen minutes.

Q Did you consent to that?

A No, I did not.

Q Why didn't you scream or fight or do something?

A If I would have screamed or fought or anything, I would have been hurt worse than what I was.

Q Did Mr. Miller have a weapon at that time?

A Yes, he did. He had that piece of bar.

Transcript at 118-19.

Q And what happened?

A He told me to take off my pants. He still had the knife with him and the same logic held, that I didn't want to get stabbed, so I took off my pants.

Q Then what happened?

A He put lotion on my rectum and proceeded to rape me.

Q How long did that last, Willard?

(Footnote Continued)

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(Footnote Continued)

A Between ten and fifteen minutes.

Q Did he ejaculate into you?

A Yes, he did.

Q Then what happened?

A I proceeded into the bathroom to clean up a little bit and Mr. Preston followed me. He told me, after I once was in there, that either I was going to have sex with him or Miller was going to beat me up.

Q And what happened then?

A I followed him back into the broom closet. On -- at the door of the broom closet, Mr. Miller told me to have sex with Mr. Preston. After we were once inside the broom closet, Mr. Miller stayed outside to shoot jiggers. Mr. Preston told me I had a choice, either I could give him a blow job or I could have sex with him. I didn't want it in my mouth, so, the only other alternative I had was to take off my pants, which I did.

Q Then what happened?

A He put lotion on my rectum and proceeded to put his penis up my rectum.

Q How long did that last, Willard?

A Approximately fifteen minutes.

(Footnote Continued)

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(Footnote Continued)

Q Then what happened?

A I got dressed. The door was open. I went back into the print shop area, picked up my pass and went back to West Hall.

Q Did you report any of that?

A No, I did not.

Q Did you consent to have sex with Mr. Miller or Mr. Preston?

A No, I did not.

Q Why did you do it?

A If I wouldn't have, I probably would have been dead now.

Transcript at 124-25.

Q Tell us what -- how you've changed since you were raped?

A I can't sleep at night because, when I do get to sleep, I wake up with bad dreams. I fear for my life. I fear other people.

Q What kind of dreams do you have?

A One that I've had is I'm in this building getting chased by a green monster that I cannot outrun.

(Footnote Continued)

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(Footnote Continued)
Q Did you ever have that dream before?

A No, I have not.

Q Did you ever have any problems sleeping before?

A No, I did not.

Q Do you still have those dreams?

A Yes, I do.

Q Since you filed your lawsuit have any inmates made advances on you?

A Yes, they have.

Q What kind of advances?

A I've been asked to moon inmates. I've been asked to participate sexually with inmates. I've -- that's basically it.

Q Have you done that?

A No, I have not.

Q Have you received any counseling up there at the penitentiary to help you with any of these problems?

A No, I have not. I put in requests to a psychologist, thirty or forty of them at least, and he has seen me once.

(Footnote Continued)

country can easily reach the six-figure level.[6] In the present case the award was at a minimal level approaching inadequacy. There is no cross appeal here on the inadequacy of the award and we therefore do not address that issue. However, it is clear that the paltry sum awarded the plaintiff is barely reasonable for the damages he

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(Footnote Continued)
Q Did you consent to any of those sexual contacts with those other inmates?

A No, I did not.

Transcript at 145-46.

[6] See, e.g., Jardel Co. v. Hughes, 523 A.2d 518 (Del. 1987) ($530,000 jury award to rape victim sustained on appeal); Gordon v. Chicago Transit Auth., 470 N.E.2d 1163, 128 Ill. App. 3d 493, 83 Ill. Dec. 743 (Ill. App. Ct. 1984) ($200,000 jury award to assault and rape victim sustained on appeal); Virginia D. v. Madesco Inv. Corp., 648 S.W.2d 881 (Mo. 1983) (en banc) (trial court entered judgment for defendant notwithstanding the verdict; on appeal, Supreme Court of Missouri reversed and reinstated $100,000 jury award to assault and molestation victim).

incurred. Any award by the jury for the mere abstract violation of the eighth amendment was indeed minimal. We are confident that another jury, on retrial of the case on damages only, could easily return an award substantially greater than that which was returned. On that basis, although there was error, we find the error harmless.

**Injunctive Relief**

Vosburg sought injunctive relief as it pertained to double celling. Based upon the testimony in the case both from the plaintiff and other youthful inmates illustrating the considerable frequency of assaults, the district court granted Vosburg's request for injunctive relief in part ordering the defendants to report to the Attorney General and to the State's Attorney for Minnehaha County all cases in which they had reasonable cause to believe that a rape had occurred at the prison. The district court, however,

denied injunctive relief against double celling because subsequent to the jury trial the South Dakota penitentiary adopted written rules (1) prohibiting double celling of inmates in the orientation and indoctrination unit except when it was considered necessary for suicide prevention, and (2) prohibiting inmates convicted of crimes against other persons being double celled with inmates convicted of nonviolent crimes. The court also noted that the issue of double celling in the protective area of the prison had earlier been addressed by Chief Judge Porter in Cody v. Hillard, 599 F. Supp. 1025 (D.S.D. 1984).

In Cody, Judge Porter enjoined double celling in the protective custody area. On this basis Judge Jones asserted injunctive relief beyond that rendered in Cody would not be necessary. On October 6, 1987, the panel opinion in Cody v. Hillard, 799 F.2d 447 (8th

Cir. 1986), which affirmed the district court, was reversed by this court en banc. Cody v. Hillard, 830 F.2d 912 (8th Cir. 1987) (en banc), cert. denied, 108 S.Ct. 1078 (1988). The effect of the en banc decision was to reverse the district court's award of injunctive relief with respect to double celling. The en banc court noted that although there was evidence of fighting and assaults between inmates, 599 F. Supp. at 1033, nothing in the record showed the comparative number of incidents of violence before and after double celling. This court held because the district court did not make a finding of fact on this issue, there was no evidentiary basis for a finding that the elimination of double celling would alleviate the problems within the prison. Cody, 830 F.2d at 914.

In the present case, the record is replete with evidence of sexual assaults both

on the plaintiff and upon other younger inmates. In the summer of 1981, an eighteen- or nineteen-year-old boy was raped three times by his cell mate. He tried to commit suicide after the rapes. The record in this case also reveals that more than 500 crimes were investigated in the South Dakota prison between 1984 and 1985 and that there were over 140 instances of fighting and assaults during that period of time. It is now 1988. Although South Dakota has made substantial changes in the prison system, as evidenced by a later report filed in the Cody case by the prison authorities, we have no way of knowing whether these additional changes have effectively provided a means to prevent the serious assaults revealed by the record before us. However, this issue cannot be decided here. Although the state has not made a suggestion of mootness, the briefs suggest that Vosburg was released in October

of 1986. We assume this to be true although the record is otherwise silent as to this fact. On this basis the issue of injunctive relief appears to be moot. See Murphy v. Hunt, 455 U.S. 478 (1982). The case would not fall within the narrow exception as providing challenged action of short duration and capable of repetition because there would be no reasonable expectation that Vosburg would be subjected to the same action again. Id. We therefore dismiss the appeal on the denial of the injunctive relief as moot.

**Attorney's Fees**

The trial court awarded attorney's fees in this case under 42 U.S.C. § 1988. The trial court is in a much better position than this court to view the evidence and to evaluate the testimony and the work product of the attorney. We feel the award made by the trial court is a reasonable one and should be sustained. In doing so we offer

our commendation to Michael J. Schaffer, plaintiff's attorney, for the obvious public service that has been performed in the detailed production of evidence that fills nine volumes of trial testimony.

**Post-Judgment Interest**

The trial court failed to award post-judgment interest on the plaintiff's verdict. Title 28 U.S.C. § 1961 provides that "interest shall be allowed on any money judgment in a civil case recovered in a district court." It is well-settled that the court may award interest from the date of the verdict where an appropriate time has elapsed between the reading of the verdict and entry of the judgment. See Buck v. Burton, 768 F.2d 285, 286-87 (8th Cir. 1985). The delay between the verdict and the judgment was not the plaintiff's fault. We find that the trial court should enter judgment on the verdict and award post-judgment interest from

the date of the verdict. The judgment on the verdict and the award of attorney's fees are hereby affirmed. The cause is remanded to the district court with directions to dismiss the prayer for injunctive relief as moot.

MAGILL, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority's conclusion that the district court properly denied appellants' motion for a judgment n.o.v. and a new trial. The frequency of assault at the South Dakota State Penitentiary was sufficiently high that a jury might reasonably find a pervasive risk of harm to the prisoners. Appellants' failure to develop administrative policies to protect Vosburg and his fellow inmates in the intake facility and other high-risk areas of the penitentiary clearly justifies a jury finding that appellants failed to respond reasonably to the risk of inmate assault. Regretfully,

however, I do not join the rest of the majority's opinion because I cannot agree that the mis-instruction of the jury as to damages was harmless error.

I will begin by restating enough from the record to make my objections intelligible. At the end of a lengthy closing argument, Vosburg's counsel turned to the issue of damages and stated:

> And then the final question you have got to decide, if you decide liability, you have got to decide the question of damages. I was appointed to represent Willard. As a part of my duty, I had a duty to put a number of what that is worth, to be raped, to have suffered that. I thought it was worth $500,000. I wouldn't go through it for that. I wouldn't go through it for anything. You're going to get an Instruction. It is Instruction No. 19 that talks about the value of a constitutional right. Take a look at that Instruction. It is an important right in our system. And maybe you can't--it's not like I have got medical bills or anything like that to show you what can be done or how to compute it. But, it is an important right and it is a

> right that is entitled to be compensated.

Tr. at 975.

After counsel's peroration, the district court, without objection, gave Instruction No. 19:

* * * *

> Damages for violations of constitutional rights are more difficult to measure than damages for physical injury or injury to one's property. There are no substantial medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded, that is, in the event you find there is liability.
>
> The precise value placed upon any Constitutional right which you find was denied to the plaintiff is within your discretion.

This instruction was fully in accordance with circuit precedent, which approved of

damage awards based on the abstract value, or importance, of a constitutional right. Herrera v. Valentine, 653 F.2d 1220, 1227-31 (8th Cir. 1981). While this appeal was pending, the Herrera instruction was invalidated by Memphis Community School District v. Stachura, 106 S.Ct. 2537, 2541 n.5 (1986). As a consequence, the district court's instruction that the jury could properly consider the abstract value of the constitutional protection against cruel and unusual punishment is erroneous under the current state of the law.

The majority assumes[1] that Stachura must be applied retroactively, ante at 6, but then

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[1]While failure to object to a jury instruction is normally fatal, see Fed. R. Civ. P. 51, we retain the discretion to review error not preserved for appeal if that error is so prejudicial as to have "seriously affected the fairness, integrity or public

(Footnote Continued)

goes on to determine that the jury instruction was harmless error solely on the basis of its selective forays into the record. It is with the majority's use of the record and application of the harmless error rule that I take issue.

In Carey v. Piphus, 435 U.S. 247 (1978), and more recently in Stachura, 106 S.Ct. at

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(Footnote Continued)
reputation of judicial proceedings." Rowe International, Inc., v. J. B. Enterprises, Inc., 647 F.2d 830, 835 (8th Cir. 1981) (citation omitted). In Ratliff v. Wellington Exempted Village Schools Board of Education, 820 F.2d 792, 796-98 (6th Cir. 1987), a case very near to the one before us, the court applied Stachura retroactively to nullify a damage award in a section 1983 action because the jury was instructed, without objection, to consider the intrinsic value of the plaintiff's constitutional rights. The Ratliff court's discussion of the interplay between the plain error rule, Fed. R. Civ. P. 51, and the Supreme Court's "retroactive application" doctrine, Bradley v. School Board of the City of Richmond, 416 U.S. 696, 711 (1974), illuminates the reasons for retroactive application of the Stachura rule where no objection to a jury instruction has been made at trial.

2542, the Supreme Court instructed us to look first to common-law tort rules of recovery in order to compensate for injuries caused by constitutional deprivations. We have previously identified several interests protected by common-law tort rules that might be relevant to constitutional deprivations. Persons deprived of their constitutional rights are entitled to compensation for (1) physical injury, pain and suffering; (2) emotional distress; and (3) impairment of future earning capacity. Taken Alive v. Litzau, 551 F.2d 196, 199 (8th Cir. 1977); Bauer v. Norris, 713 F.2d 408, 413 (8th Cir. 1983). The latter category requires no elaboration because Vosburg made no claim for impairment of earning capacity. The sufficiency of proof as to the former two, however, merits some discussion.

A more searching view of the record reveals that Vosburg presented scant evidence

as to the extent of his physical harm and emotional distress and no evidence of any physical illness resulting from that emotional distress. As Jury Instruction No. 19 indicated, "[t]here are no substantial medical bills or other expenses by which [we] can judge how much compensation is appropriate." The testimony set out in the majority's opinion, ante at 8-12, is carefully culled from nine volumes of trial testimony and represents the total evidence of physical and emotional harm that Vosburg attested to at trial. Vosburg also testified that he had not been examined by a medical doctor or mental health care professional, and that he was uncertain if the assaults had any effect on him because he hadn't seen a psychiatrist. Vosburg's expert, Dr. Sable, who testified about "rape trauma syndrome," was a medical doctor--not a mental health care professional--and never examined

Vosburg. No other expert testimony was presented by Vosburg. While there was evidence about the effect of rape generally, there was little evidence of the emotional effect on Vosburg. As the Supreme Court cautioned in Carey, 435 U.S. at 263-64, emotional distress in a section 1983 action must be proved by "showing the nature and circumstances of the wrong and its effect on the plaintiff." The Court further noted: "Although essentially subjective, genuine injury in this respect must be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury." Id. at n.20 (citation omitted). Vosburg simply presented no concrete evidence of his emotional distress.

I would be happy to forgive this sin of omission and join the majority's affirmance

of the damages award if the district court had not instructed the jury to assign a value to Vosburg's constitutional right to be free from cruel and unusual punishment. This instruction, and the prominent part that it played in Vosburg's presentation of proof, as indicated in the trial transcript and in his closing statement, presents the real danger that the jurors' consideration may have wandered from the injuries Vosburg suffered into an impermissible consideration of the value of his constitutional rights, or at the very least, that the jury may have blurred the distinction between the two. Both results are prohibited under Stachura, 106 S.Ct. at 2546.

This danger is exacerbated by the nature of the constitutional right at issue. The Eighth Amendment protection against cruel and unusual punishment is a right esoteric to most who serve as jurors, unlike other rights

more conspicuous in our system of ordered liberty. Jury Instruction No. 19 directed the jury to assign an abstract value to the right to be free from "cruel and unusual" punishment, punishment defined by the district court in Jury Instruction No. 11 as "abuse of such base, inhumane, and barbaric proportions as to shock the sensibilities." Thus, the jury was asked to give an abstract value to a right that in itself was defined in abstract terms. These jury instructions, taken together, increased the likelihood that the jury returned an award based on abstract, as opposed to actual, damages.

The majority attempts to vault over this conundrum by comparing the damages award here to damages awarded in other sexual assault cases. In each of the cases cited by the majority, however, substantial evidence of physical and emotional harm to the victim was presented to the jury. None of those cases

involved a challenge to the jury instructions or damages awarded, but instead raised issues of liability. More to the point, comparison of jury awards cannot alter the fact that the jury verdict here was a general one and thus is not amenable to the type of "harmless error" calibration that the majority puts to it. Stachura, 106 S.Ct. at 2546.

The essence of my complaint is that the majority focuses on the likelihood that a remand would result in a larger award for Vosburg, instead of considering, as it must, whether the verdict here may have been based on an impermissible consideration of the value of Vosburg's constitutional rights. In so doing, the majority turns a blind eye toward the last paragraph of Stachura, which controls here:

> When damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, "[the] error in the charge is difficult, if not

> impossible, to correct without retrial, in light of the jury's general verdict." * * * It is likely, although not certain, that a major part of these damages was intended to "compensate" respondent for the abstract "value" of his [constitutional] rights. For these reasons, the case must be remanded for a new trial on compensatory damages.

Id. at 2546 (citation omitted).

In the final analysis, how much, if anything, the jurors awarded for the intrinsic value of Vosburg's Eighth Amendment rights is destined to remain unknown and unknowable, given the cloistered nature of jury deliberations. Without this insight, the jury instruction at issue "constitutes an error 'so obvious and prejudicial as to affect the fairness' of the trial." Ratliff, 820 F.2d at 798 (citation omitted). Although I can well understand the majority's sympathy for Vosburg because I share in it, I see no escape from the conclusion dictated by

Stachura and Ratliff, that we must remand for a new trial as to damages.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-5032/5033

| | | |
|---|---|---|
| Willard Ralph Vosburg, Appellee/Cross-Appellant, | * | Appeal from the United States District Court for the District of South Dakota |
| vs. | * | |
| Herman Solem and Richard Rist, Appellant/Cross-Appellee. | * | |

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court is affirmed on the verdict and on the award of attorney's fees and post-verdict interest. The cause is remanded to the district court with directions to dismiss the

prayer for injunctive relief as moot in accordance with the opinion of this Court.

April 27, 1988

Appellee/cross-appellant will recover from the appellants/cross-appellees the sum of $285.00.

A true copy.

ATTEST: /s/ Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

MANDATE ISSUED 6/23/88

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 87-5032/5033-SD

| | | |
|---|---|---|
| Willard Ralph Vosburg, | * | |
| | * | Appeals from the |
| Appellee, | * | United States |
| | * | District Court |
| vs. | * | for the |
| | * | District of |
| Herman Solem, et al., | * | South Dakota |
| | * | |
| Appellants. | * | |

The petition for rehearing en banc is denied. The plaintiffs' attorney is awarded attorney fees for time expended in this court in the amount of $6,768.75 plus six percent sales tax on said fee. Counsel is likewise awarded reimbursement for expenses in the sum of $1,235.66. Said sum includes the expense of $325.00 for paralegal services.

June 16, 1988

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

| | | |
|---|---|---|
| WILLARD RALPH VOSBURG, | * | CIV 84-4085 |
| | * | |
| Plaintiff, | * | |
| | * | |
| -vs- | * | |
| | * | |
| HERMAN SOLEM and | * | |
| RICHARD D. RIST, | * | |
| | * | |
| Defendants. | * | |

For the Plaintiff . Mr. Michael J. Schaffer
Attorney at Law
513 South Main Avenue
Sioux Falls, SD 57102

For the Defendant . Mr. John Bastian
Assistant Attorney General
State Capitol Building
Pierre, SD 57501

MEMORANDUM OPINION

The plaintiff brought this action under 42 U.S.C. § 1983 alleging that he was raped while a prisoner at the South Dakota Penitentiary and seeking both monetary and injunctive relief. After a jury trial,

plaintiff received a verdict on his claim for damages of $10,000 against defendants Herman Solem and Richard D. Rist.

The injunctive relief sought is (1) a prohibition of double celling in the intake/orientation and protective custody areas of the penitentiary, (2) that a guard be required to be stationed at the shop area, (3) that the pass system be modified to prevent inmates from being able to use the system to call other inmates to any areas of the penitentiary, (4) that all sexual assaults be referred to the State's Attorney for Minnehaha County for prosecution, and (5) that all victims of sexual assaults receive counseling.

Following the jury trial in this case, the South Dakota Penitentiary adopted written rules on two subjects related to this action. One rule prohibits double celling of inmates in the orientation and indoctrination unit

except when it is considered necessary for suicide prevention, and precludes inmates convicted of crimes against other persons from being double-celled with inmates convicted of non-violent crimes. Another rule relates to the investigation and referral for prosecution of assaults, including sexual assaults.

Prison rape has been identified as a national problem. Martin v. White, 742 F.2d 469 (8th Cir. 1984). While conditions in the South Dakota Penitentiary are unquestionably better than at maximum security prisons in larger states, the evidence in this case establishes that South Dakota does need to be concerned about sexual assaults against younger and smaller inmates.

I conclude that the written rule adopted by the South Dakota Penitentiary on January 17, 1986 adequately addresses the problems of double-celling in the orientation

and indoctrination unit of the prison. The decision in Cody v. Hillard, 599 F. Supp. 1025 (D.S.D. 1984) adequately addresses the issue of double-celling in the protective custody area of the prison. Therefore, plaintiff's request for injunctive relief relating to double-celling in the intake and protective custody areas will be denied.

Plaintiff's requests that a guard be permanently stationed in the shop area and that the pass system used by the prison be modified will also be denied. It does not appear from the evidence that either of these changes would have any effect on reducing the incidence of rape at the penitentiary. While the plaintiff testified that he was raped in the shop area, there is no evidence that the risk of rape to inmates is any greater in the shop area than in any other area of the prison.

The most significant area for improvement in the prevention of prison rapes lies in the prosecution of offenders. It is also the most difficult to address for several reasons: (1) prison officials do not make the final decision on what offenses should be prosecuted; (2) prison rapes, like those in society, are generally committed in private with only the victim and offender present; (3) the rapes are often not promptly reported to prison officials by the victims; and (4) victims of prison rapes are often persons who would not make particularly credible witnesses.

These problems have apparently acted in the past as an effective bar to prosecution for prison rapes, since the record herein indicates that no inmate has ever been prosecuted for rape occurring in prison in South Dakota, successfully or otherwise. This case demonstrates that juries will

believe credible claims of rape by inmates, and if it thereby encourages future prosecutions for rape in prison, it will have been valuable to South Dakota.

The rule adopted by the prison for investigation of rapes and other assaults makes provision only for referring cases to the South Dakota Attorney General's office for prosecution. The State's Attorney of Minnehaha County and the Attorney General have concurrent jurisdiction for prosecution of crimes occurring at the penitentiary. S.D.C.L. §§ 7-16-9, 23-3-3. I conclude that if prison officials have reasonable cause to believe that a rape has occurred at the penitentiary, they should report it both to the Attorney General and the State's Attorney of Minnehaha County.

There was evidence that the prison officials left to the plaintiff/victim the task of reporting to prosecutors the rapes

involved in this case. While in many types of crimes it is appropriate to leave to the victim the decision on whether to report a particular crime to the State's Attorney or Attorney General for prosecution, prison rapes are an exception and should be reported by prison officials. The state has a greater interest in prosecution of prison rapists than the victim does in many if not most cases. Therefore the plaintiff's request for injunctive relief requiring that all sexual assaults be referred to the State's Attorney of Minnehaha County for prosecution will be granted.

Counseling of prisoners is desirable in many areas, including the counseling of rape victims. In this case, the plaintiff was released from the penitentiary after the rapes occurred, and it does not appear that he made any effort to obtain counseling for rape trauma during the period he was out of

prison. Plaintiff did not request counseling until after the completion of the jury trial. While counseling would be desirable for rape victims, the evidence does not support the imposition of a court-ordered counseling program.

Plaintiff's request for injunctive relief requiring the officials of the South Dakota State Penitentiary to report both to the Attorney General and to the State's Attorney of Minnehaha County all cases in which they have reasonable cause to believe that a rape has occurred at the prison will be granted, and all other requests for injunctive relief will be denied.

Dated this 11th day of September, 1986.

/s/ John B. Jones
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

| | | |
|---|---|---|
| Willard Ralph Vosburg,<br><br>Plaintiff,<br><br>v.<br><br>Herman Solem, Richard Rist, Clifford E. Hoff, Lloyd D. Stivers, Jr., Richard J. Mohr, and Jervin E. Wait,<br><br>Defendants. | ) | CIV 84-4085<br><br>JUDGMENT IN A CIVIL CASE |

XX **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the Plaintiff, Willard

Ralph Vosburg, and against the Defendants Herman Solem and Richard D. Rist, and damages assessed in the amount of $10,000.00 under Count I of the Complaint.

IT IS FURTHER ORDERED that the Plaintiff recover of the Defendants his costs of the action in the amount of $ _____, such costs to be hereinafter taxed and inserted herein by the Clerk, and attorney fees if allowed by the Court in the amount of $ _____.

IT IS FURTHER ORDERED AND ADJUDGED that the Complaint against Clifford Hoff, Lloyd D. Stivers, Jr., Richard J. Mohr and Jervin E. Wait be dismissed on the merits with prejudice and without costs.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's request for injunctive relief requiring the officials of the South Dakota State Penitentiary to report both to the Attorney General and to the State's Attorney of Minnehaha County all cases in which they

have reasonable cause to believe that a rape has occurred at the prison is granted, and all other requests for injunctive relief are denied.

September 11, 1986 /s/ William F. Clayton
Clerk

By /s/ DeAnn Noteboom
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

| | | |
|---|---|---|
| WILLARD RALPH VOSBURG, | * | CIV 84-4085 |
| | * | |
| Plaintiff, | * | |
| | * | |
| -vs- | * | |
| | * | |
| HERMAN SOLEM and | * | |
| RICHARD D. RIST, | * | |
| | * | |
| Defendants. | * | |

APPEARANCES:

For the Plaintiff . Mr. Michael J. Schaffer
Attorney at Law
513 South Main Avenue
Sioux Falls, SD 57102

For the Defendant . Mr. John Bastian
Assistant Attorney General
State Capitol Building
Pierre, SD 57501

MEMORANDUM OPINION

AND

ORDER

Plaintiff brought this action under 42 U.S.C. § 1983, alleging that he was raped in

the South Dakota Penitentiary. Plaintiff received a jury verdict for $10,000 and part of the injunctive relief sought.

There are pending for decision: (1) the Defendants' Motion for Judgment Notwithstanding the Verdict and New Trial, Alternatively, (2) Plaintiff's Application for Award of Attorney's Fees, and (3) Plaintiff's Motion to Amend Judgment.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants base their motion for judgment notwithstanding the verdict primarily on Davidson v. Cannon, ___ U.S. ___, 106 S.Ct. 668, 88 L.Ed.2d ___ (1986), which held that prison officials cannot be held liable for negligence. In this case, the § 1983 claim was based on the Eighth Amendment claim that defendants acted with reckless disregard of his right to be free from violent attacks by fellow inmates. The

case was submitted to the jury under the principles of law set forth in Martin v. White, 742 F.2d 469 (8th Cir. 1984).

Applying the standards of review set forth in Smith v. Updegraff, 744 F.2d 1354 (8th Cir. 1984), to-wit: viewing the evidence in a light most favorable to plaintiff, there is sufficient evidence to support the jury's verdict. Defendants' Motion for Judgment Notwithstanding the Verdict and New Trial, Alternative, must be denied.

ATTORNEYS FEES

42 U.S.C. § 1988 authorizes the award of attorney's fees to a prevailing plaintiff in a civil rights case.

Plaintiff asserts that he incurred itemized expenses of $3,553.42 and based on a charge of $75 per hour for himself and $25 per hour for paralegals, he has submitted vouchers for attorney's fees of $21,303.95 and $858.75 plus 6% sales tax. Plaintiff

further requests that the award be enhanced by a 30% multiplier because of his exceptional success.

While defendants have objected to the amounts of the fees requested, they have not objected that the hourly rate sought was unreasonably high or that the work claimed was not actually performed. I find the hourly rate requested is reasonable and that the work claimed was actually performed. The hours worked times the hourly fee thus becomes the lodestar fee, subject to being revised upwards or downwards.

Applying the principles set forth in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), I find no basis for either reducing or increasing the fee claimed.

Plaintiff is entitled to recover expenses of $3,553.42, attorney's fees of

$22,162.70 and sales tax of $1,329.76, or a total of $27,045.88.

MOTION TO AMEND JUDGMENT

Plaintiff's verdict for $10,000.00 was returned on January 14, 1986. The issues relating to injunctive relief, motion for judgment NOV, and attorneys fee issues have delayed entry of final judgment to this time.

Plaintiff requests that judgment be amended herein to include interest on the verdict from the date of the verdict rather than the date of the judgment to be entered. Plaintiff asserts that the Court should award interest from the date of the verdict where, without fault of the plaintiff, an appreciable time has elapsed between the rendition of the verdict and the entry of the judgment, citing Louisiana & Arkansas Ry. Co. v. Pratt, 142 F.2d 847 (5th Cir. 1944) and Buck v. Burton, 768 F.2d 285 (8th Cir. 1985).

The principle of law asserted by plaintiff is correct, but I conclude it is not applicable to this case. Most of the delay is attributable to the resolution of the injunctive relief sought by plaintiff with [sic] a lesser amount of delay is involved with the determination of appropriate attorney's fees. The motion for interest on the verdict from the date of verdict will be denied.

ORDER

Upon the foregoing opinion and the record herein,

IT IS ORDERED:

(1) That Defendants' Motion for Judgment Notwithstanding the Verdict and New Trial, Alternatively is denied.

(2) That Plaintiff shall recover attorney's fees and costs in the amount of $27,045.88.

(3) That Plaintiff's Motion to Amend Judgment to include post-verdict interest is denied.

Dated this 28th day of November, 1986.

BY THE COURT:

/s/ John B. Jones
United States District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK
By /s/ Jackie Meisenheimer
DEPUTY

APPENDIX G

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

| | | |
|---|---|---|
| WILLARD RALPH VOSBURG, | * | CIV 84-4085 |
| | * | |
| Plaintiff, | * | |
| | * | |
| vs. | * | JUDGMENT |
| | * | |
| HERMAN SOLEM and RICHARD D. RIST, | * | |
| | * | |
| Defendants. | * | |

The above-entitled matter having come on before the Court on briefs and a jury having awarded plaintiff $10,000.00, the Court having entered its Memorandum Opinion and Order, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Judgment Notwithstanding the Verdict and New Trial, Alternatively is denied; it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff shall recover attorney's fees and

costs in the amount of $27,045.88; and, it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Amend Judgment to include post-verdict interest is denied.

Dated this 1st day of December, 1986.

/s/ William F. Clayton
William F. Clayton, Clerk
U.S. District Court